No. 3082

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEO. C. TREAT, EDMUND SMITH
and LOGAN ARCHIBALD,
Appellants,

vs.

H. E. ELLIS,
Appellee.

Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE

L. V. Ray,
Counsel for Appellee.

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Brief for Appellee

STATEMENT OF THE CASE.

In the case of H. E. Ellis, Appellant, vs. George C. Treat, Edmund Smith and Logan Archibald, Appellees, No. 2758, on the docket of the Circuit Court of Appeals, a decision was rendered and is reported in Vol. 236 Federal, page 120. Subsequent to the decision of this Honorable Court, and prior to the entry of judgment in the Alaskan Court, pursuant to remittitur, the appellees in the former case as plaintiffs, instituted another action against the same defendant, H. E. Ellis, concerning the same subject matter, but on a slightly different theory as to a remedy and as to the rights of the various parties.

In the case at bar in the lower court, H. E. Ellis, defendant therein, appellee herein (and for the sake of convenience hereafter the parties will be designated as in the lower court), filed his answer to the complaint of plaintiffs in which he set up among other defenses the defense of *res judicata,*

and under the provisions of equity rule 29, moved the court for a decision in respect to such defense of *res judicata,* and thereafter made and entered its order in said cause sustaining the plea of *res judicata* set up in defendant's answer and ordered the action dismissed. Record page ———.

To such order made dismissing the action, the plaintiffs excepted and prosecuted to this court their appeal thereon.

ARGUMENT.

The matter to be argued before this Honorable Court is as to the correctness of the decision of the lower court herein. By its order such court sustained a plea of *res judicata* entered on behalf of the defendant in such action, and further ordered the dismissal of the cause. In view of the fact of the recent decision of this Honorable Court concerning the same subject matter and between the same parties, counsel for defendant will make no elaborate argument.

At the outset, we desire to call the attention of the court to the similarity of the two complaints in the two actions. A comparison will demonstrate that except for the relief demanded in the second action, the causes are practically identical and that in such relief so referred to but one clause differs from the prayer for relief in the first action.

It is the contention of the defendant that the decision of this court, reported in 236 Fed. 120, is a final determination and adjudication of all of the rights existing between the parties in respect to those matters and things adjudicated in the first action as well as any other matter, thing or con-

troversy growing out of the same state of facts and circumstances which might have been presented and determined in such first or former litigation; that the defendant is entitled to have litigation concerning this same subject matter and growing out of the same state of facts and circumstances brought to an end. Merely because counsel for the opposite parties desire to present a different theory, the defendant should not be subjected to further extensive and expensive litigation to enable a test to be made as to whether the theory of counsel is sound or otherwise.

As we understand the elementary principles of the rule of *res judicata,* the purpose and object of such rule is to put an end to litigation between the same parties, concerning the same subject matter. I can find no better statement of the effect to be given to such doctrine, or rule, than that contained in the case of Hart Steel Co. and Guilford S. Wood, Petitioners, vs. Railroad Supply Co., 244 U. S. 294, p. 299, 61 Law Ed. 1148, p. 1153, as follows:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect.
>
> Kessler v. Eldred, 206 U. S. 285, 51 Law Ed. 1065."

It is the contention of counsel that it is fundamental that parties asking relief in courts of equity must bring forward their entire case and clearly state the details of the controversy, and if they do not so elect, they are estopped from again litigating the same question by raising some point in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward by reason of negligence, inadvertence, or accident.

From an examination of the opinion in the case of Ellis vs. Treat, 236 Fed. 120, page 123, it is apparent that the appellate court, under the general prayer for such other and further relief, considered the entire case upon all of the facts as shown by the record. The language being as follows:

> "It remains to be considered whether, under the allegations of the bill, and the prayer for such other and further relief as may be just and equitable, the appellees are entitled to a decree for the specific performance of the contract which they pleaded. There are several reasons why such relief must be denied them."

We respectfully call the court's attention to the fact that the mandate in cause No. 2758 did not remand the case for further proceedings with privilege to amend, or file supplemental bill, but directed, without qualification, the dismissal of the case, not the dismissal of the bill of complaint as not stating facts sufficient to constitute a cause of action as by plaintiffs in this action claimed.

Specific attention of the court is requested to the case of Dowell vs. Applegate, 152 U. S. 327, 38 Law

ed. 463, the 4th section of the syllabi being as follows:

> "A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented."

One of the leading cases cited by Mr. Justice Harlan therein is the case of Cromwell vs. Sac. County, 94 U. S. 351, 24 Law ed. 195. On this principle, nothing can be gained by collecting the cases in large numbers, as is easily done from digests and foot notes to text books. Counsel does, however, cite the following cases as supporting the contention made before this court in respect to the doctrine of *res judicata:*

Fayerweather vs. Ritch, 91 Fed 721;
Manhattan Trust Co. vs. Trust Co. etc., 107 Fed 328;
McCulloch vs. Davenport Savings Bank, 226 Fed. 309;
Union Central Life Ins. Co. vs. Drake, 214 Fed. 536;
Dana vs. Morgan, 219 Fed. 313;
Fellows vs. Bordens Condensed Milk Co., 188 Fed. 863;
Landon vs. Bulkley, 95 Fed. 344;
Strottman vs. Railway Company, 30 L. R. A. N. S. 377 (note);
Tood vs. Bettingen, 18 L. R. A. N. S. 263 (note).

For the convenience of the court I set forth herein the following quotation from the opinion by Mr. Justice Field in the case of Cromwell vs. Sac. County, 94 U. S. 351, 24 Law ed. 195, quoting from

the case of Henderson vs. Henderson, 3 Hare 100, p. 115, as follows:

> "In trying this question, I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *rès judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounces a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

As a general summary of the rule and the principles governing the same, the following excerpt from the opinion given in the case of Union Central Life Ins. Co. vs. Drake, 214 Fed. 536, cited in the case of McCulloch vs. Davenport Savings Bank, 226 Fed. 309, as follows:

> "In Union Central Life Co. vs. Drake, 214 Fed. 536, 131 C. C. A. 82, Justice Sanborn in a very instructive opinion says:
>
> Rule 1. 'The rules of estoppel by which this contention must be tested are: When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to

every question which was or might have been presented and determined in the former.'

Rule 2. 'When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive relative to other matters which might have been, but were not, litigated or decided. Cromwell v. Sac. County, 94 U. S. 351, 24 L. ed. 195; Grider v. Groff, 202 Fed. 685, 689; 121 C. C. A. 95, 99; Linton v. Life Ins. Co., 104 Fed. 584, 587; 44 C. C. A. 54, 57; Commissioners v. Platt, 79 Fed. 567, 571; 25 C. C. A. 87, 91; Board v. Sutliff, 38 C. C. A. 167, 171; 97 Fed. 270, 274; Southern Pac. Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. ed. 355; Southern Minn. Ry. Extension Co. v. St. Paul, S. C. R. Co., 55 Fed. 690; 5 C. C. A. 249.'

In Southern Pac. R. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. ed. 355, it is said:

'The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies. And even if the second suit is upon a different cause of action, the right, question, or fact so determined must, as between the parties or their privies, be taken as conclusively established so long as the judgment remains unmodified. This rule, said Mr. Justice Harlan, in Southern Pacific R. R. Co. vs. United States, above, 168 U. S. at page 149, 18 Sup. Ct. at page 27, 42 L. ed. 355, is demanded for the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

The contention of the defendant cannot be sustained.

'Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in the determination of an action before a competent court, in which a judgment or decree is rendered upon the merits, cannot again be litigated between the parties and privies, whether the claim or demand, purpose or subject-matter of the two suits be the same or not. The doctrine of *res judicata* applies, and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and every part of it must stand irrevocably closed by such determination.' 24 Am. & E. Ency. of Law, pages 710-712.

'This estoppel extends, not only to every material fact within the issues which are expressly litigated and determined, but also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided. Hence it is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point controverted in the second action. Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded.' 24 American & E. Ency. of Law, page 766."

As supporting the action of the lower court in passing upon the defense of *res judicata,* under Equity Rule 29, without consideration of other matters pleaded in defense and without a formal trial of the cause, counsel cites:

Boyd et al. vs. New York & H. R. Co. et al., 220 Fed. 174.

Counsel, therefore, submits the action of the lower court in sustaining the plea of defendant of *res judicata,* and decreeing the dismissal of the action should be in all respects affirmed.

Respectfully submitted,

L. V. Ray,
Counsel for Defendant and Appellee.